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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO, DECEASED,
Plaintiff-Appellee, Petitioner,

vs.

CURTIS, FRIEDMAN & MARKS,
Defendants-Third Party Plaintiffs,

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Illinois Supreme Court Has Decided a Constitutionally Important Question of Substance Not in Accord with Applicable Decisions of the United States Supreme Court	7
II. The Decision of the Illinois Supreme Court Is Contrary to a Long-Established Public Policy of Favoring Private Settlement of Litigation as Enunciated by the Supreme Court of the United States	8
Conclusion	10

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The petitioner, Frank Gatto, individually and as Administrator of the Estate of Sophie Gatto, deceased, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in this proceeding on September 26, 1975, rehearing for which was denied on November 21, 1975.

OPINION BELOW.

The opinion of the Supreme Court of Illinois, filed on September 26, 1975, is reported in 61 Ill. 2d 513, 337 N. E. 2d 23. This petition arises out of a reversal of judgments entered

for the plaintiffs and third party plaintiffs (lessors) on the verdicts of the jury on August 13, 1969. In the first appeal, the Illinois Appellate Court affirmed the verdicts and judgments of the court below both as to the facts and law of the case. 6 Ill. App. 3d 714. The Appellate Court denied respondent's petition for rehearing. The Illinois Supreme Court denied respondent's petition for leave to appeal to that court. Three years and eight months after verdict, respondent filed a petition in the trial court to vacate the judgment for the plaintiffs. The second trial judge to whom the matter was assigned reviewed the record and affidavits filed by counsel and, on June 1, 1973, denied respondent's motion to vacate the judgment. No timely appeal was taken from this order containing a specific finding that no fraud was presented which would entitle respondent to relief. Respondent thereafter filed another motion to limit execution on the judgment which the trial judge denied on August 21, 1973. In the second appeal, the Illinois Appellate Court reversed and limited execution on the judgment to $80,000. 23 Ill. App. 3d 628. The Supreme Court of Illinois granted leave to appeal and reversed the judgments, without remandment, on September 26, 1975. Rehearing was denied November 21, 1975.

JURISDICTION.

The jurisdiction of this Court is invoked under Rule 19-1(a) of the Supreme Court Rules, Title 28 U. S. C.

QUESTIONS PRESENTED.

1) Whether petitioner was denied his Constitutional rights to due process of law since no trial was conducted on the merits of the respondent's post-appeal motions as required by the Fifth and Fourteenth Amendments.

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STATEMENT OF THE CASE.

This case is a civil action arising out of a complaint filed for personal injuries sustained by petitioner's intestate on June 19, 1964. The jury returned a verdict in favor of petitioner's intestate in the sum of $100,000 and for the petitioner individually, in the sum of $20,000 against the owners of the property (lessors) in which the injuries were sustained. The jury also returned a verdict in favor of the property owners (lessors) and against the respondent in the sum of $120,000.

During the trial in the court below, counsel for the respondent embarked upon a course of misconduct calculated to create a mistrial. Despite repeated warnings by the trial judge, counsel for the respondent persisted in his obstreperous behavior. At the conclusion of the trial, the trial judge made a lengthy statement summarizing the misconduct of respondent's counsel so that the reviewing court could be fully advised of what had taken place during the trial. A part of that statement follows:

> Now, Mr. Peterson, from the very beginning of the trial in the court's opinion you pursued a course of conduct designed to bring about a mistrial. Now, I have been around a long time and I don't think I misconstrued what you were intending to do and unfortunately the conduct of an attorney, of course, is sometimes visited on his client. I hope it wasn't true in this case, but if it was I feel the client must bear the burden of the unfortunate conduct of its counsel . . . Again, I am not saying this with any animosity towards you personally, but I think your conduct in this trial was very reprehensible. The record, I think, will speak for itself and you sorely tried the patience of both the court and counsel, I can assure you, and I don't believe that you accomplished what you were about to do . . .

The misconduct of counsel for the respondent was also commented upon by various attorneys for the co-defendants. In the first appeal, the Appellate Court reviewed the misconduct of counsel for respondent and noted:

> Reading of the voluminous record shows that the trial judge was indeed confronted with a situation well calculated to try the judicial soul. 6 Ill. App. 3d at 733.

Faced with these bizarre circumstances and threats by counsel for respondent that the plaintiffs would never live to see the day that they would collect any sum of monies from respondent, plaintiffs entered into an agreement with certain defendants at the beginning of the second week of trial. By the terms of the agreement, plaintiffs received $80,000 from the lessors but were required to pay that sum to the lessors out of any verdict that might be entered against the respondent. The trial judge and the attorneys for the defendants were advised of the agreement. Only counsel for respondent denies knowing of the agreement between the parties. However, counsel for respondent filed an affidavit in the trial court which indicated that *during the trial* he reported to his client the exact amount of the payments made to the plaintiffs. Four of the trial attorneys (including attorneys for co-defendants who were not involved in the agreement) filed affidavits confirming notice of the agreement and payments thereunder to counsel for respondent during the trial.

The parties to the agreement of August 1, 1969, were not dismissed from the lawsuit since they had pending claims against remaining defendants (including respondent) which had not been resolved. Under the law of Illinois, the defendants who made payments under the agreement were entitled to pursue their action for indemnity against respondent and other defendants. The jury found the lessors guilty of ordinary negligence (passive tort feasors) and found respondent guilty of willful and wanton misconduct (active tort feasor). Illinois has always permitted indemnity actions by passive tort feasors against active tort feasors. This law was affirmed on appeal in this case, 6 Ill. App. 3d at 731 and reaffirmed in the second appeal, 23 Ill. App. 3d at 640. The Illinois Supreme Court did not reverse on this point of law.

BLEED THROUGH

The jury was not advised of the agreement of August 1, 1969, nor of the payments made thereunder. The law in Illinois at the time of the trial precluded the parties from advising the jury of payments made under the agreement of August 1, 1969. *Tresch* v. *Nielsen*, 57 Ill. App. 2d 469 at 476 (1965). As a matter of fact, the introduction of evidence of payments made to the plaintiff under a covenant has been held so prejudicial to the rights of the plaintiff as to warrant a reversal. *DeLude* v. *Rimek*, 351 Ill. App. 466, 475 (1953).

The sole basis for the reversal of the judgments entered in this case on August 13, 1969, totalling $120,000 was the alleged non-disclosure of the agreement of August 1, 1969. The Supreme Court of Illinois did not reverse on either the facts of the case or the law applied to those facts. After an exhaustive review of the transcript of the trial, the Illinois Appellate Court on two separate occasions affirmed the judgments for the plaintiff. After having been found guilty of *willful* misconduct, respondent has been completely exonerated from the payment of any sum whatsoever on judgments entered against it totalling $120,000.

The trial in this case was conducted in accordance with the basic concepts of due process of law. Counsel for respondent vigorously cross-examined all adverse witnesses and presented the testimony of his witnesses in the trial court. No claim has ever been made that the agreement of August 1, 1969, in any way affected the outcome of the jury verdict. Plaintiff's verdicts were taken away, however, without a trial or in accordance with due process of law as guaranteed by the Fifth and Fourteenth Amendments.

The facts in the voluminous record of this case have been adequately summarized in the opinions of the Illinois Appellate Court. 6 Ill. App. 3d 714 and 23 Ill. App. 3d 628. Petitioner will not attempt to restate those facts in this petition. The following matters are relevant to this appeal:

1. The injuries sustained by the petitioner's intestate were so grotesque that the amount of the award of damages was never raised in either appeal.

2. The liability of the respondent was so evident that the Appellate Court noted:

> There is *ample* evidence in the record to justify both verdicts. 6 Ill. App. 3d at 734.

3. The liability of the lessors-third party plaintiffs was so clear that the Appellate Court concluded:

> . . . The doctrine of *res ipsa loquitur* has frequently been applied to situations such as presented by the case at bar. 6 Ill. App. 3d 731.

4. The negligence of lessors was found to be passive while petitioner was found to be actively guilty of willful misconduct. 6 Ill. App. 3d at page 731.

5. In the second appeal, Justice Goldberg wrote:

> We wish to make it clear that, in our opinion, the result above reached the Calumet is equitably entitled to relief concerning the extent of its liability as an indemnitor does not in any manner rest upon prejudice to Calumet during the trial of the action. On the contrary, there was no prejudice to the rights of Calumet during the trial. No situation developed at trial concerning the effect of the agreement upon any person along lines suggested by the supreme court in *Reese* (55 Ill. 2d 356, 364). Our previous minute examination of the trial record, without knowledge of the existence of the agreement, impelled us to conclude that the judgment of liability for active negligence was properly entered against Calumet as an indemnitor. (See 6 Ill. App. 3d 714, 731.) We cannot conceive that the agreement itself had any bearing upon this result or any effect upon the trial of the issues between plaintiffs and the Lessors. 23 Ill. App. 3d 628 at 640.

6. The Illinois Supreme Court reversed petitioners' judgments, without a remandment, solely on procedural matters.

BLEED THROUGH

REASONS FOR GRANTING THE WRIT.

I. The Illinois Supreme Court Has Decided a Constitutionally Important Question of Substance Not in Accord with Applicable Decisions of the United States Supreme Court.

The *only* evidence offered by the respondent in the trial court consisted of two conflicting affidavits signed by counsel for the respondent. In his first affidavit, counsel for respondent admitted, under oath, reporting the exact amount of the payments made under the agreement of August 1, 1969, to his insurance company *during the trial*. He admitted the confirmation of the exact amounts of payment during post-trial motions (A. 24). In his second affidavit, counsel for respondent sought to contradict his first affidavit (A. 99-100). Both affidavits referred to a letter which counsel for respondent had written to his insurance company client during trial. That letter was never produced. The petitioner filed counter-affidavits of several attorneys for respondents' co-defendants which proved conclusively that counsel for respondent was aware of the payments made to the plaintiffs during trial (A. 143-146).

Petitioner was not afforded the opportunity to have a trial on the merits of the respondent's petition. No hearing was conducted. Petitioner was not given the opportunity to cross-examine counsel for respondent. This was crucial to the petitioner's right to a fair trial, particularly in view of the conflicting affidavits filed by the attorney for the respondent and his failure to produce the written documentation which was summarized in his affidavits. Due process of law required that petitioners be granted this right to confront the attorney for the respondent with cross-examination. Since the Illinois Supreme Court based its reversal of the judgments for the petitioner solely on the affidavits of counsel for the respondent, the right of cross-examination of respondent's counsel was critical to the guarantee of the petitioner's Constitutional rights to due process of law.

Trial by affidavit is not due process of law. This case was reversed without a remandment on a matter which had no affect upon the evidence or law applicable thereto. Even in civil matters, this Court has repeatedly held that the right of an individual to cross-examine adverse witnesses is Constitutionally protected. In *Greene* v. *McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 at page 1391, Mr. Justice Warren wrote:

> While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (citations) but also in all types of cases where administrative and regulatory actions were under scrutiny.

In *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1001, 25 L. Ed. 2d 287 at page 300, Mr. Justice Brennan reaffirmed the Constitutionally-protected rights of cross-examination by holding:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

II. The Decision of the Illinois Supreme Court Is Contrary to a Long-Established Public Policy of Favoring Private Settlement of Litigation as Enunciated by the Supreme Court of the United States.

The agreement of August 1, 1969, between the petitioner and two defendants was the first loan agreement of record in an Illinois case. Similar agreements had been approved in other States. The first case to reach the Illinois Supreme Court involv-

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ing a loan agreement was *Reese* v. *Chicago, Burlington & Quincy R. R. Co.*, 55 Ill. 2d 356 (1973). The majority opinion followed the reasoning in *Luckenback* v. *McCahan Sugar Refining*, 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53 (1918) approving loan agreements and favoring private resolution of litigation. There was, however, a strong dissent in the *Reese* case which was written by the Justice who reversed the judgment for the petitioner in this case.

At the time of the trial in the court below, petitioner did not have the clairvoyance to foresee the procedural changes that would be brought about by *Reese*. Petitioner did follow the procedural rules which were binding upon him at the time of the trial. Admittedly, the jury was not advised of the existence of the loan agreement of August 1, 1969. The law of Illinois at the time of this trial prevented the introduction of such payments in evidence.

At the time of the trial in the court below, there was substantial federal authority approving loan agreements. The *Luckenback* case, *supra*, held loan agreements valid under federal common law. This case has been followed subsequently in *White Hall Building Corp.* v. *Profexray Division of Litton Industries*, 387 F. Supp. 1202, 1205; *Executive Jet Aviation, Inc.* v. *U. S.*, 507 F. 2d 508 (6th Cir. 1974).

The Illinois Supreme Court, in reversing the petitioner's judgment, deprived the petitioner of his right to enter into a loan agreement under federal common law. The Illinois Supreme Court also deprived the petitioner of his Constitutionally-guaranteed freedom to contract under Article I, § 10, of the United States Constitution. The punitive measures taken by the Illinois Supreme Court were tantamount to the abrogation of petitioner's fundamental right to freedom of contract.

CONCLUSION.

The Illinois Supreme Court acknowledged the petitioner's right to indemnification against the respondent in the sum of $80,000 (61 Ill. 2d 513, 522). The Court, incongruously, however, reversed petitioner's judgment without a remandment for a new trial, thereby depriving petitioner, as assignee of lessor's judgment, to indemnity.

Justice and fairness should preclude speculation on what effect the agreement of August 1, 1969, might have had upon the verdict of the jury. If there is any question as to whether evidence of the existence of the loan agreement could have influenced the verdict of the jury, then this case should have been remanded for a new trial. The trial court could be instructed, on remandment, to allow the agreement to be received in evidence. Petitioner should not be deprived of his judgment because of procedural matters. Due process of law requires procedural errors to be rectified by a new trial rather than outright reversal.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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